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In The

Supreme Court of the United States

October Term, 1993

EF OPERATING CORPORATION t/a
WEST MOTOR FREIGHT OF PA,

Petitioner,

vs.

S.S. FISHER STEEL CORPORATION and
M.P. FLAHERTY ASSOC., INC.,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ABRAHAM C. REICH,
Counsel of Record
PHILIP W. FISHER
FOX, ROTHSCHILD, O'BRIEN
& FRANKEL
2000 Market Street
Philadelphia, PA 19103

(215) 299-2000

*Attorney for Respondent,
M.P. Flaherty Associates, Inc.*

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I. QUESTION PRESENTED

Whether under the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., M. P. Flaherty Associates, Inc., as an innocent consignee, is obligated to pay, a second time, a common motor carrier's freight charges for goods shipped when the consignee previously paid the shipper-consignor the full freight charges and the carrier delivered the goods under bills of lading marked "prepaid"?

II. LIST OF PARTIES

The list contained in the Petition for Writ of Certiorari is complete.

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V. OPINIONS BELOW

The decisions and opinions of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit are included in the Appendix to the Petition for Writ of Certiorari.

VI. STATEMENT OF JURISDICTION

The statement of the grounds on which the jurisdiction of this Court is sought is correctly presented in the Petition for Writ of Certiorari.

VII. STATUTES

Interstate Commerce Act, 49 U.S.C.A. §§ 10101-11917 (West 1991).

VIII. STATEMENT OF THE CASE

The facts in this case as they relate to the Respondent, M.P. Flaherty Associates, Inc. ("Flaherty"), are not in dispute.

The Petitioner, EF Operating Corporation ("EF Operating"), is a common motor carrier with a place of business in Pennsylvania. Tex-Ark Joist Company ("Tex-Ark"), as shipper-consignor, requested EF Operating, as a carrier, to transport three shipments of merchandise to certain job sites of Flaherty. The shipments occurred from

February 8, 1989 through April 14, 1989. As EF Operating has admitted throughout these proceedings, and as the Courts below have found, the goods were transported pursuant to bills of lading marked "prepaid", which signifies that the freight charges will be paid by the consignor (Tex-Ark). *See*, Opinion rendered in this case by the United States Court of Appeals for the Third Circuit, Petitioner's Appendix, p. 17a. In reliance upon the bills of lading, and in accordance with the custom of the industry, Flaherty, as consignee, paid Tex-Ark the cost of the merchandise along with all shipping charges. However, Tex-Ark did not remit payment for the freight charges to EF Operating.

On October 17, 1989, creditors of Tex-Ark filed an Involuntary Chapter 7 Petition against Tex-Ark Joist Company in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. Tex-Ark subsequently converted the case to Chapter 11. All of the assets of Tex-Ark were sold and there was no distribution to the unsecured creditors.

In its Statement of the Case, EF Operating attempts to mask as factual assertions certain legal conclusions as to an alleged agency relationship. These allegations were never raised in the District Court, and, therefore, they are not part of the record before this Court.

IX. SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied. The Circuits that have addressed the issue have uniformly held that if a consignee has accepted goods pursuant to a bill of lading marked "prepaid", the carrier is estopped from collecting the freight charges from the consignee if the consignee has paid the consignor the full freight charges. This holding is not in conflict with any decision of this Court.

X. ARGUMENT – REASONS FOR DENYING PETITION

As previously set forth, EF Operating, as a carrier, transported merchandise on behalf of Tex-Ark, as a shipper-consignor. All of the delivery tickets and EF Operating's freight bills are marked "prepaid".

It is undisputed that Flaherty paid Tex-Ark for the cost of the merchandise and for the full freight charges. Thereafter, EF Operating was unable to collect the freight charges from the bankrupt Tex-Ark. EF Operating argues that Flaherty is liable for these charges. However, the case law is clear that EF Operating's position cannot be sustained, and the District Court properly granted summary judgment in favor of Flaherty. The decision of the Third Circuit Court of Appeals in upholding the grant of summary judgment in favor of Flaherty is consistent with all of the other Circuits that have addressed this issue, and does not conflict with any decisions of this Court.

EF Operating argues that a consignee is absolutely liable for freight charges incurred with respect to the shipment of goods in interstate commerce. Contrary to EF Operating's contention, the ICA does not impose strict liability on the consignee.

The general rule is that a consignee is not liable to a carrier for freight charges where a third-party consignor contracted with the carrier to deliver goods to a consignee under a bill of lading which was either unmarked or indicated that freight had been "prepaid". The Circuit Courts addressing this issue have unanimously adopted this rule. *Davis v. Akron Feed*, 296 F. 675 (6th Cir. 1924); *Missouri Pacific R.R. Co. v. National Milling Co.*, 409 F.2d 882 (3d Cir. 1969); *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971); *Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972); *In re Roll Form Products, Inc.*, 662 F.2d 150 (2d Cir. 1981). Specifically, if a consignee, such as Flaherty, has accepted a shipment of goods under a bill of lading marked "prepaid," the carrier is estopped from collecting the freight charges from the consignee if the consignee has paid the consignor the full freight charges. The parties to a bill of lading are free to determine the liability imposed on each for freight charges. *Id.*

This rule of law appears to have been implicitly adopted by this Court. *See, Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 366, 437-48 (1982). In *Southern Pacific*, the consignor shipped goods to the consignee under bills of lading that provided that the consignor would be primarily liable for freight charges to the carrier, unless the consignor signed a "nonrecourse" clause providing that the carrier shall not make delivery

of the shipment without payment of freight charges. The consignor failed to execute this clause. When the consignee failed to pay the carrier, the carrier sought payment from the consignor.

This Court held that the consignor was liable for the freight charges because it failed to execute the nonrecourse provision. This Court held that the consignor, being the one who contracts with the carrier to transport goods, is primarily liable for the carrier's charges, unless it is specifically exempted by the bill of lading. In *Southern Pacific* this Court distinguished *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971), noting that the consignee in *Admiral* was entitled to an equitable estoppel defense because it had detrimentally relied on the carrier's misrepresentation that the freight charges were "prepaid".

The fanatical reliance on and interpretation of this Court's decision in *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116 (1990) by EF Operating is misplaced. EF Operating relies heavily upon *Maislin* for the proposition that no equitable defense can stand in the way of a common carrier's right to recover charges due under the applicable tariff. However, unlike the case at bar, *Maislin* involved the liability of a shipper/consignor for failure to pay the full filed shipping rate. In *Maislin*, the carrier, Maislin Industries, and the shipper/consignor negotiated shipping rates that were less than the rates filed with the Interstate Commerce Commission. Maislin sought to recover the freight undercharges. This Court held that the consignor was liable for the undercharges. Unlike the *Maislin* case, Flaherty was a consignee and not the shipper/consignor.

Contrary to EF Operating's interpretation, the *Maislin* Court did not hold that a carrier must, regardless of circumstances, receive its freight charges. Rather, this Court held that the rate charged must be the filed rate. This appeal does not concern whether EF Operating is entitled to charge its filed rate instead of some privately negotiated rate, or whether there is some danger of approving unlawful, discriminatory pricing schemes if EF Operating is not allowed to collect its freight charges. Flaherty, as a consignee, paid for the services rendered, and paid the proper filed rates. Therefore, the question in this case is not what rate the carrier should charge, but from whom the carrier should seek payment.

Requiring Flaherty to pay twice for services rendered once would penalize Flaherty for relying on EF Operating's own bills of lading, and the normal trade practice. By presenting Flaherty with the bills of lading marked "prepaid", EF Operating represented that the freight charges had been paid. In reliance on this, Flaherty paid the freight charges to Tex-Ark. EF Operating is attempting to shield itself from its own negligent conduct. Bills of lading marked "prepaid" in the freight forwarding industry signify that the freight charges have been paid. If EF Operating's position is upheld, then contrary to the normal industry practice, no consignee will be able to rely on such bills of lading.

EF Operating has completely failed to articulate any legitimate policy reason why this Court should grant the Petition for Writ of Certiorari. The decision of the Third Circuit Court of Appeals is not in conflict with any

decisions of this Court, nor in conflict with the decisions of other courts of appeal addressing this issue.

XI. CONCLUSION

The Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

ABRAHAM C. REICH,
Counsel of Record
PHILIP W. FISHER
FOX, ROTHSCHILD, O'BRIEN
& FRANKEL
2000 Market Street
10th Floor
Philadelphia, PA 19103-3291
(215) 299-2000

Attorney for Respondent,
M.P. Flaherty Associates, Inc.